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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

HENRY ARTHUR DRAKE,

Petitioner,

v.

STATE OF GEORGIA,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI BY THE ATTORNEY GENERAL

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QUESTIONS PRESENTED

1.

Whether this Court should consider Petitioner's allegations that his constitutional rights under the Eighth and Fourteenth Amendments to fundamental fairness and due process were violated by the denial of his extraordinary motion for new trial, when the federal questions were not presented to the state courts for consideration.

2.

Whether the Supreme Court of Georgia properly upheld the trial court's denial of Petitioner's extraordinary motion for new trial based on an independent and adequate state ground.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED. i

STATEMENT OF THE CASE. 1

REASONS FOR NOT GRANTING THE WRIT

I. THIS COURT SHOULD REFUSE TO CONSIDER THE ISSUES RAISED BY THE PRESENT PETITION, AS NONE OF THE FEDERAL QUESTIONS RAISED WERE PROPERLY PRESENTED TO THE STATE COURTS FOR A DECISION. 3

II. THE SUPREME COURT OF GEORGIA PROPERLY UPHELD THE DENIAL OF PETITIONER'S EXTRAORDINARY MOTION FOR NEW TRIAL BASED ON AN ADEQUATE AND INDEPENDENT STATE GROUND. 7

CONCLUSION. 9

CERTIFICATE OF SERVICE. 10

TABLE OF AUTHORITIES

Cases Cited:

Bell v. State, 227 Ga. 800, 183 S.E.2d 357 (1971). 4, 7

Burge v. State, 133 Ga. 431, 66 S.E. 243 (1909). 4

Cardinale v. Louisiana, 394 U.S. 437 (1969). 6

Drake v. State, 241 Ga. 583 (1978). 1

Drake v. State, 248 Ga. 891 (1982). 5, 7

Emmett v. State, 232 Ga. 110 (1974). 7

Henry v. Mississippi, 378 U.S. 443 (1965). 8

Offutt v. State, 238 Ga. 454 (1977). 7

NO. _____

IN THE

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STATE OF GEORGIA,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI BY THE ATTORNEY GENERAL

PART ONE

STATEMENT OF THE CASE

Petitioner received a jury trial in the Superior Court of Madison County, Georgia, on August 29 through 31 and September 1, 1977 and was convicted of the offenses of armed robbery and murder. Petitioner received a life sentence for armed robbery and the death penalty for the offenses of murder. Petitioner's convictions and sentences were affirmed by the Supreme Court of Georgia in Drake v. State, 241 Ga. 583 (1978). Subsequently, Petitioner Drake filed a petition for a writ of habeas corpus in the Superior Court of Butts County, Georgia. This petition was denied on December 14, 1979. The extraordinary motion for new trial was served on counsel for the state on June 1, 1981. Attached to Petitioner's motion was the affidavit of August F. Siemon, III, who stated that in the spring of 1979 he represented the Petitioner and that in May or June of 1979, he interviewed William Campbell who admitted that he, William Campbell killed the victim, C.E. Eberhart and that Petitioner had no part in the robbery/murder.

A hearing was held on Petitioner's extraordinary motion for new trial before Judge William F. Grant of the Northern Judicial Circuit on July 7, 1981. William B. Campbell was sworn and testified on behalf of the Petitioner. At the hearing, Mr. Campbell acknowledged that on two prior occasions he had testified under oath that Petitioner had done the actual killing, but that the truth was that Petitioner had no part in the robbery and killing and that he, Campbell, had killed and robbed the victim. (Motion transcript, pp. 4-19). On direct examination, Mr. Campbell declared that he had decided to tell the truth two years ago (Motion transcript, p. 30), but that he had never told any attorney

other than his own the truth, until a week earlier. (Motion transcript, p. 31-32). On direct examination by counsel for Petitioner, Mr. Campbell insisted that he had not signed his affidavit until about a week ago because he did not want to, because he still wanted to lead a "crooked life." (Motion transcript, p. 32).

On cross-examination by Mr. Huff, Mr. Campbell denied ever having spoken with lawyer August Siemon about the Petitioner's innocence. (Motion transcript, p. 44-46). Mr. Campbell further asserted to Mr. Huff that two years ago he would have signed a statement concerning Drake's innocence. (Motion transcript, p. 51). Campbell stated that he told Petitioner's mother three years ago that he would sign a statement and that he told Petitioner the same thing. (Motion transcript, p. 52). On redirect examination, Mr. Campbell reiterated that he had never talked with any of Petitioner's lawyers at Jackson, Georgia two years ago. (Motion transcript, p. 61).

The Supreme Court of Georgia considered the foregoing evidence presented in the hearing on Petitioner's extraordinary motion for new trial, as well as considering the transcripts of Petitioner's trial and the trial of Mr. Campbell. The court then found that Petitioner had not met the standard for granting a new trial on the basis of newly discovered evidence which has been established under Georgia law. Therefore, the court upheld the trial court's denial of Petitoner's extraordinary motion for new trial. At no time, did Petitioner raise the federal questions on which he now seeks review of this Court, but rather asserted that the trial court had erred in denying his extraordinary motion for new trial based on newly discovered evidence.

PART TWO

REASONS FOR NOT GRANTING THE WRIT

I. THIS COURT SHOULD REFUSE TO CONSIDER THE ISSUES RAISED BY THE PRESENT PETITION, AS NONE OF THE FEDERAL QUESTIONS RAISED WERE PROPERLY PRESENTED TO THE STATE COURTS FOR A DECISION.

Petitioner seeks to have this Court decide the issue of whether or not the application of Georgia law with reference to the standard necessary for the granting of an extraordinary motion for new trial on the basis of newly discovered evidence, denied him certain of his constitutional rights. The only issue which should be before this Court is whether, as a matter of Georgia law, Petitioner's extraordinary motion for new trial was properly denied. After being denied relief on direct appeal and in a state habeas corpus proceeding, neither of which directly concerned the issues which Petitioner would have this Court consider, Petitioner filed his extraordinary motion for a new trial in the Superior Court of Madison County, Georgia. The "newly discovered evidence" upon which Petitioner claims he should be granted a new trial, is the testimony of coindictee William Campbell, that he, Campbell, and not Drake committed the murder of victim E.C. Eberhart.

In Georgia, the rules relating to the granting of a new trial based upon newly discovered evidence are as follows:

" . . . (1) that the evidence has come to the knowledge of the moving party since the trial; (2) that it was not owing to the want of due diligence that he did not acquire it sooner; (3) that it is so material that it would probably produce a different verdict; (4) that it is not cumulative only; (5) that the affidavit of the witness himself should be procured or its absence accounted for; and (6) that a new trial will not be granted if the only effect of the evidence will be to impeach the credit of a witness."

Bell v. State, 227 Ga. 800, 805, 183 S.E.2d 357 (1971), quoting Burge v. State, 133 Ga. 431, 432, 66 S.E. 243 (1909). The trial court found that there was "no valid legal reason that requires a new trial in said case and therefore, the extraordinary motion for new trial made by the defendant must be denied."

(See Appendix "A" to the petition for a writ of certiorari filed by the Petitioner).

From this denial of the extraordinary motion for new trial, Petitioner appealed to the Supreme Court of Georgia, simply alleging that the trial court erred in denying appellant's extraordinary motion for new trial and erred in denying appellant's motion to be present at the evidentiary hearing on his extraordinary motion for new trial. (See Attachment "A" to this brief which is the brief of the Appellant and Appellant's Enumeration of Errors).

Petitioner did not raise the constitutional claims of denial of due process and fundamental fairness under the Eighth and Fourteenth Amendments, due the operation of the state rule concerning extraordinary motions for new trial, which he now seeks to have this Court review. The Supreme Court of Georgia did not address the constitutional considerations concerning which Petitioner now seeks the review of this Court, but rather held that Petitioner had not met the standard for establishing that he is entitled to a new trial on the basis of newly discovered evidence as set forth under Georgia law. Drake v. State, 248 Ga. 891, 894 (1982). The court held as follows:

> "Pretermitting the question of whether the 'newly discovered evidence' meets the first five of the above requirements, it is clear that the effect of Campbell's new testimony is to impeach the credibility of his earlier sworn statements. The law is settled that a post-trial declaration by a State's witness that his former testimony was false is not a ground for a new trial. Stroud v. State, 247 Ga. 395 (276 S.E.2d 597)(1981); Sutton v. State, 238 Ga. 336, 338 (232 S.E.2d 569)(1977); Fowler v. State, 187 Ga. 406(1 S.E.2d 18) (1939); Felton v. State, 56 Ga. 84 (1876); Richey v. State, 132 Ga. App. 188 (207 S.E.2d 672)(1974); Code Ann. § 70-204."

Id. at 894.

A review of Petitioner's enumeration of error and brief on appeal and the decision of the Supreme Court of Georgia, does not

show that the issues upon which Petitioner now seeks the review of this Court were raised in the state courts. Therefore, this issue is not properly presented to this Court. This Court has held on numerous occasions that it will not decide federal constitutional issues raised for the first time in this Court on review of a state court decision. Cardinale v. Louisiana, 394 U.S. 437 (1969). In the present case, the Petitioner has attempted to raise federal questions which were never raised, preserved or passed upon in the state court. This Court has noted that in a federal system "it is important that state courts be given the first opportunity to consider the application of state statutes in light of constitutional challenges." Cardinale v. Louisiana, supra, at 439. Thus, Respondent submits that this Court should refuse to review these issues as the state courts of Georgia have not had an opportunity to pass on the federal questions raised.

II. THE SUPREME COURT OF GEORGIA PROPERLY UPHELD THE DENIAL OF PETITIONER'S EXTRAORDINARY MOTION FOR NEW TRIAL BASED ON AN ADEQUATE AND INDEPENDENT STATE GROUND.

In general, extraordinary motions for new trial are not favored in Georgia. Such motions will be granted only in cases such as do not ordinarily occur in human affairs. The prerequisite for the granting of an extraordinary motion for new trial have been previously set out in this brief. As already noted, the Supreme Court of Georgia found that the effect of Campbell's new testimony was to impeach the credibility of his earlier sworn statements and therefore, a new trial on the basis of newly discovered evidence was not established because under Georgia law a new trial will not be granted if the only effect of the evidence will be to impeach the credit of a witness. Drake v. State, 248 Ga. 891, 894 (1982), quoting Emmett v. State, 232 Ga. 110, 117 (1974) and Bell v. State, 227 Ga. 800, 805 (1971). The Supreme Court of Georgia stated that all six requirements must be complied with if a new trial is to be secured. Drake v. State, supra, at 894, citing Offutt v. State, 238 Ga. 454, 455 (1977). Thus, the Supreme Court of Georgia followed state standards in finding that the trial court properly denied Petitioner's extraordinary motion for new trial. As already noted, the court did not decide any federal question presented concerning whether or not the state standard violated Petitioner's constitutional rights under the Eighth and Fourteenth Amendments, but rather decided the case based on the fact that the state standard had not been met.

This Court has declined to review state court judgments based on adequate and independent state grounds, as long as there is no discrimination on the part of the state court merely because a federal question is involved. Henry v. Mississippi, 378 U.S. 443 (1965). Therefore, as the state court properly interpreted Georgia law, Respondent submits that this Court should decline to review the issues presented by this petition.

Respondent does not concede that even if this Court should determine that the issues raised by Petitioner should be reviewed, that they are of merit, but rather, asserts that the sixth prerequisite for securing a new trial based on an extraordinary motion for new trial alleging newly discovered evidence, does not deny Petitioner any of his constitutional rights.

CONCLUSION

For all of the above and foregoing reasons, Respondent respectfully submits that this Court should deny this petition for a writ of certiorari.

Respectfully submitted,

MICHAEL J. BOWERS
Attorney General

ROBERT S. STUBBS, II
Executive Assistant
Attorney General

MARION O. GORDON
Senior Assistant
Attorney General

JOHN C. WALDEN
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Attorney General

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D
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IN THE SUPREME COURT OF GEORGIA

HENRY ARTHUR DRAKE,	:	
Appellant	:	
VS.	:	CASE NO. 38034
STATE OF GEORGIA	:	
Appellee	:	

ENUMERATION OF ERRORS

I.

The trial court erred in denying Appellant's Extraordinary Motion for New Trial.

II.

The trial court erred in denying Appellant's motion to be present at the evidentiary hearing on his Extraordinary Motion for New Trial.

Respectfully submitted,

MARTIN & YOUNG

Mary D. Wilkes

MARY D. WILKES

Attorneys for Henry Arthur Drake

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CERTIFICATE OF SERVICE

This is to certify that I have this date served copies of the within and foregoing Enumeration of Errors on Cleve Miller, District Attorney for the Northern Judicial Circuit, State of Georgia, Post Office Box 247, Elberton, Georgia 30635, Bryant Huff, District Attorney for the Gwinnett Judicial Circuit, State of Georgia, Post Office Box 569, Lawrenceville, Georgia 30246, and Michael J. Bowers, Attorney General of the State of Georgia, 132 State Judicial Building, 40 Capitol Square, S.W., Atlanta, Georgia 30334, by placing same in the United States Mail in properly addressed envelopes with adequate postage affixed thereon to assure delivery.

This 19th day of October, 1981.

Mary J. Wilkes

Mary J. Wilkes

IN THE SUPREME COURT OF GEORGIA

HENRY ARTHUR DRAKE,	:	
Appellant	:	
VS.	:	CASE NO. 38034
STATE OF GEORGIA	:	
Appellee	:	

REQUEST FOR ORAL ARGUMENT

COMES NOW the Appellant in the above-styled case, and hereby requests that the case be scheduled for oral argument.

Appellant hereby certifies that District Attorney Bryant Huff has been notified of Appellant's intention to argue the case orally and that upon inquiry Mr. Huff has stated that the State also desires to argue the case orally.

This 19th day of October, 1981.

MARTIN & YOUNG

By: Mary J. Wilkes
MARY J. WILKES

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CERTIFICATE OF SERVICE

This is to certify that I have this date served copies of the within and foregoing Request for Oral Argument on Cleve Miller, District Attorney for the Northern Judicial Circuit, State of Georgia, Post Office Box 247, Elberton, Georgia 30635, Bryant Huff, District Attorney for the Gwinnett Judicial Circuit, State of Georgia, Post Office Box 569, Lawrenceville, Georgia 30246, and Michael J. Bowers, Attorney General of the State of Georgia, 132 State Judicial Building, 40 Capitol Square, S.W., Atlanta, Georgia 30334, by placing same in the United States Mail in properly addressed envelopes with adequate postage affixed thereon to assure delivery.

This 19th day of October, 1981.

Mary J. Wilkes